felt would have intruded upon the primary jurisdiction of the Interstate Commerce Commission as reannounced in the Clayton Act. At page 455 of the Opinion in the *Georgia* case, the Court pointedly said "Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled". In our case, the Court of Appeals has permitted Penn Water to do the very thing which the Court indicated could not be done in *Georgia v. Pennsylvania R. Co.*

Although the *Georgia* case was decided under the statutory adoption by the Clayton Act of the doctrine of primary jurisdiction, with reference to the Interstate Commerce Commission, that doctrine is strongly established as common law doctrine and as a cardinal principle of administrative law by other decisions of this Court. It should clearly protect the Federal Power Commission's primary jurisdiction over its tariff in this case, (the Basic Agreement), and necessarily preclude Penn Water's collateral attack thereon, such as we have here. *Texas & P. R. Co. v. Abilene Cotton Oil*, 204 U. S. 426 (1907); *Rochester Telephone Co. v. U. S.*, 307 U. S. 125, 139 (1939).

The Court of Appeals also erred in holding that the approval of the Basic Agreement by the regulatory authorities of Pennsylvania was a prerequisite to its validity. When it is understood that *every provision* of the Basic Agreement constitutes one of the contractual terms of an interstate sale of energy at wholesale, and that every one must be considered (as the Federal Power Commission did) in determining the proper rate at which that sale shall be made, any necessity for approval by state authorities disappears. If the Commerce Clause removes the interstate sale at wholesale from the regulatory power of the States (see *Public Utilities Commission v. Attleboro Steam*

and Electric Co., 273 U. S. 83; *Missouri v. Kansas Gas Company*, 265 U. S. 298) then it also removes from State authority the contractual terms of that sale.

The same language may be used, for the same reason, regarding the holding of the Court of Appeals that the Basic Agreement is invalid because of a supposed adverse public policy of the State of Pennsylvania. The public policy which is applicable to this contract is not that of Pennsylvania's, but the public policy expressed in the Federal Power Act.

But it should also be noted that the public policy of Pennsylvania does not, in fact, conflict with the Basic Agreement (see *York Haven W. & P. Co. v. Public Service Commission*, 287 Pa. 241, 245); and further, that if the approval of the Pennsylvania commission is required, this contract, in fact, had that approval by acquiescence. Although it has been before the Pennsylvania Commission for years, this is the first time that Commission has ever questioned it.

WHEREFORE, Petitioner prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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